IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7389 OF 2004

Shri Narsinh Ramchandrarao Shinde ..Petitioner

Versus

Smt. Shobha N. Shinde & Ors. ..Respondents

Shri Ashok Bhatewara with N.G.Mahajan for petitioner

Ms.Chandana Salgaocar Radia for Respondent Nos.1 to 4

CORAM : P.V.KAKADE, J.

DATE : 25TH OCTOBER, 2004

P.C.:

1. Heard the ld. counsel for both the parties.

2. Rule. Rule made returnable forthwith.

3. This Writ Petition is preferred by the aggrieved Petitioner against the Order dated 10.8.2004 passed by Joint Civil Judge, Senior Division, Pune. With the help of both the parties I have gone through the history of the dispute. The plaintiffs sought to examine witness

in order to produce certain photographs on record of which negative is not available and therefore in the essence of the say sought to be produced was the secondary evidence regarding such photographs. However, it appears that no application was filed before the Lower Court in order to seek permission to lead secondary evidence and only an affidavit of witness was sought to be introduced along with the photographs. The witness on the point that he had taken the photographs and the photographs were old and the negatives were not traceable. The learned Trial Judge considered the affidavit and concluded that the photographs were filed along with the affidavit and the contents thereof are appears to be original i.e. negatives of the photographs were lost. In the circumstances the secondary evidence, the photographs are admitted in evidence.

4. In this regard the obvious error committed by the learned trial judge appears to be that he has admitted the photographs in evidence before cross examination is over. What he should have done to seek application to seek permission to lead secondary evidence and deciding on merits as contemplated by provisions of Section 63

r/w Section 65 of the Evidence Act, instead of that, what the learned trial judge has done is that he had admitted the photographs in the evidence as secondary evidence, which cannot be done in law. The learned counsel for the petitioner sought to rely on various judgments of this court as well as other courts. However, first ruling 2003 (4) Bom.C.R. 626 is relating to general provision of the Order 13 of C.P.C. which is not strictly applicable here. He has also sought to rely upon one more judgment of this court 1979 (BCR) 110 which is delivered in criminal matter and it is observed that before a photograph could be admitted in evidence it is necessary that the person who took the photograph should be examined and such a person should produce the negative and no positive print or enlargement could be admitted in evidence without the negative being produced in the first instance. This observation no doubt is subject to the provisions of Section 65 of the Evidence Act which relates to the situation as to what is to be done, if no negatives are available. Therefore there is no quarrel with the rulings cited by the learned counsel for the petitioner however, those are not strictly applicable to the present case.

5. Be as it may, the fact remains that it would be necessary for the learned trial judge to seek application from the plaintiff to seek permission to lead secondary evidence and thereafter the trial judge shall dispose of that application on merits after hearing both the sides and if he comes to the conclusion that plaintiff has satisfied the lower court as contemplated under Section 65 of the Evidence Act, then the trial judge would be justified in taking further steps according to law.

6. In view of this aspect the order dated 10.8.2004 is set aside. The Petition is allowed. The learned trial judge is directed to decide the issue in question in the light of the observations made by this court in the body of this judgment. With this direction the Petition stands disposed of.

7. It is clarified that the order passed by the Lower Court dated 6.8.2004 is not affected by the observations made hereinabove.

8. The plaintiff shall make application before the trial court on or before 1.11.2004 and thereafter the

learned trial judge take steps thereon immediately and would make endeavour to dispose of the entire proceeding within two months from the date of this order.

C.C. expedited.